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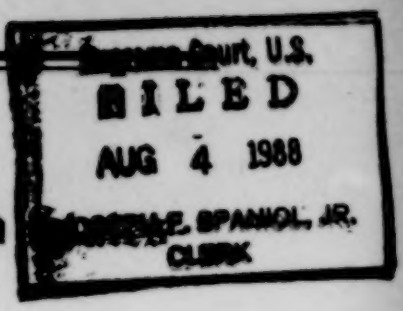

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MELVIN R. BLANTON and MARK D. FRALEY,

Petitioners,

—v.—

CITY OF NORTH LAS VEGAS, NEVADA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
SUPREME COURT OF THE STATE OF NEVADA

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF NEVADA IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI[1/]

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization of over 250,000 members dedicated to defending the Bill of Rights and advancing the civil rights and individual liberties of the people of the United States. The American Civil Liberties Union of Nevada is one of the ACLU's state affiliates.

This case presents the question whether the constitutional protection of a trial by jury should be afforded to individuals accused of driving while under the influence of alcohol, who are facing serious deprivations of liberty and property, including incarceration and

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1/ Pursuant to Rule 36.2 of the Rules of this Court, letters of consent from the parties have been filed with the Clerk of the Court.

monetary sanctions. Amici believe that persons accused of serious criminal offenses possess a fundamental constitutional right to be tried by a jury, and that the decisions of this Court support the recognition of this right in the instant case. Accordingly, we submit this brief in support of Petitioners, and we urge the Court to reverse the decision of the court below.

STATEMENT OF THE CASE[2/]

Petitioner Melvin R. Blanton was accused of driving while under the influence of alcohol ("DUI"). Following the denial of his request for jury trial of the charges against him, Petitioner filed a petition for writ of mandamus. The Eighth Judicial District Court of Nevada denied Blanton's petition for writ of mandamus, and he appealed to the Nevada Supreme Court.[3/] Petitioner Mark D. Fraley, like Blanton, was charged with DUI, but following the denial of his motion for jury trial he pled guilty. Fraley was sentenced to a period of incarceration and was

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2/ Amici adopt the Statement of the Case set forth in Petitioner's Brief, but here highlight the facts most relevant to the argument presented infra.

3/ See generally Joint Appendix (hereafter "J.A.") at 6, 13-15, 20-23.

ordered to pay a fine by the North Las Vegas Municipal Court.[4] Fraley subsequently challenged his conviction on the ground that the denial of a jury trial violated his federal constitutional rights. Fraley's appeal to the Eighth Judicial District Court was successful, and his case was remanded to the municipal court, with instructions to conduct a jury trial.[5] The City of North Las Vegas, Nevada appealed the District Court's decision, however, and the Nevada Supreme Court granted the City's petition for review.[6] The Nevada Supreme Court summarily rejected petitioners' argument that the denial of jury trials on their DUI charges violated

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4/ J.A. at 1.

5/ J.A. at 25-27.

6/ J.A. at 28-52, 101.

their constitutional rights and concluded that since state law "provide[d] a penalty of . . . six months imprisonment [or less] for a first-time DUI offense, there is no constitutional right to a trial by jury." Blanton v. North Las Vegas, 748 P.2d 292, 299 (Nev. 1987). This Court granted certiorari on June 20, 1988.[7]

SUMMARY OF ARGUMENT

The right to jury trial is a fundamental constitutional right which extends to all persons accused of committing serious crimes. The offense of driving while under the influence of alcohol is a serious crime in Nevada and thus, such cases must be tried by jury upon the demand of the accused in order to meet the requirements

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7/ J.A. at 102-03.

of the United States Constitution. The decisions of this Court provide that: (1) an individual accused of a serious criminal offense must be afforded the opportunity to be tried by a jury; (2) where the jury trial right is not statutorily mandated, the assessment of the seriousness of the offense, and hence, the determination whether a specific offense must be tried by jury upon the defendant's demand, must be conducted by the courts on a case-by-case basis; and (3) to determine whether an offense is "serious," a court must consider the maximum authorized period of imprisonment, along with a number of other factors including the collateral consequences accompanying the conviction, the intrinsic nature of, and the societal condemnation attendant to, the particular offense, as

reflected in the nature and type of sanctions imposed upon conviction.

This Court has recognized that the length of the maximum statutorily authorized sentence is not the sole determinant of the seriousness of an offense for purposes of deciding whether a state may avoid the constitutional criminal jury trial requirement. Nevertheless, the Court below relied exclusively upon the length of sentence to determine whether Petitioners were entitled to a jury trial. Under the tests articulated by this Court, the offense of driving while under the influence of alcohol is a serious offense in Nevada. Thus, the decision below, which deprived petitioners of the jury trials they requested, contravenes the requirements of the United States Constitution and should be reversed by this Court.

ARGUMENT

I. AN INDIVIDUAL ACCUSED OF A SERIOUS CRIMINAL OFFENSE IS CONSTITUTIONALLY GUARANTEED THE RIGHT TO BE TRIED BY A JURY.

A. The Criminal Defendant's Right To A Jury Trial Is A Fundamental Right Guaranteed By The Sixth Amendment To The Constitution.

The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a ... trial by an impartial jury."[8] This Court has recognized that "[t]he right to jury trial in criminal cases...[is] fundamental to our system of justice." Duncan v. Louisiana, 391 U.S. 145, 153-54 (1968). The criminal defendant's right to be tried by a jury upon demand is significant because it

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8/ U.S. Const. Amend. VI. See also U.S. Const. Art. III, § 2, cl. 3 ("The Trial of all Crimes...shall be by jury.").

> prevent[s] the possibility of oppression by the Government; the jury interposes between the accused and his accuser the judgment of laymen who are . . . less likely to function or appear as but another arm of the Government that has proceeded against him.

Baldwin v. New York, 399 U.S. 66, 72 (1970). This nation has "a long tradition [of] attaching great importance to the concept of relying on a body of one's peers to determine guilt or innocence as a safeguard against arbitrary law enforcement,"[9] and this tradition is clearly reflected in the Sixth Amendment to the Constitution.[10]

9/ Williams v. Florida, 399 U.S. 78, 87 (1970).

10/ Some commentators have described the right to trial by jury in criminal cases as "enshrined" in the Sixth Amendment. H. Kalven & H. Zeisel, The American Jury 15 (1966). Another commentator has noted that "[e]nthusiasm for the jury" predated the ratification of the Sixth Amendment, as demonstrated by the remark of one observer in 1788 that the "jury was 'adapted to the

(continued...)

Accordingly, this Court has recognized that the right to criminal jury trial, which is "'basic in our system of jurisprudence'"11/ and "'essential to a fair trial,'"12/ extends to defendants in the state courts as well as in the federal courts, and is "protected against" incursions by the state and federal governments. 391 U.S. at 148-49.

On its face, the Sixth Amendment does not admit any exception for "petty"

10/ (...continued)
investigation of truth beyond any other [system] the world can produce.'" Note, The Changing Role of the Jury in the Nineteenth Century, 74 Yale L.J. 170, 171-72 (1964) (quoting Gerry, Observations on the New Constitution (1788), reprinted in 2 Federalist and Other Constitutional Papers 714, 720 (Scott ed. 1894)).

11/ Duncan v. Louisiana, 391 U.S. at 149 (quoting In re Oliver, 333 U.S. 257, 273 (1948)).

12/ Duncan, id., (quoting Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963)).

crimes.13/ Nevertheless the Court has recognized an exception for a category of offenses that are, on the basis of several criteria, deemed petty. See Baldwin v. New York, 399 U.S. at 71-72. In such cases, a jury trial is not constitutionally required.

This Court first discussed the issue of the right to jury trial for minor offenses in Callan v. Wilson, 127 U.S. 540 (1888). There the Court vacated a police court conviction of conspiracy which carried a sentence of a $25 fine or thirty days in jail. In Callan, the Court

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13/ Indeed, Justices Black and Douglas were of the view that the Sixth Amendment and Article III, Section 2, made no distinction between "petty" and "serious" crimes. Baldwin v. New York, 399 U.S. 66, 69. As Justice White noted in Baldwin, the legal distinction may be unpersuasive to the accused since "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter." Id. at 71.

observed, in dictum, that there was a class of offenses "not of the class or grade triable at common law by a jury" that could be considered "petty" and thus, could be tried without a jury in federal court. However, the Court concluded that conspiracy was an offense indictable at common law, and thus, the right to jury trial could not be bypassed in such cases. 127 U.S. at 555.14/ Eventually, the Court was squarely presented with the issue of whether the denial of a jury trial for persons accused of offenses characterized as "petty" constituted a violation of the

14/ Significantly, the relative brevity of the period of incarceration imposed in Callan did not deter the Court from holding that the jury trial right extended to the conspiracy charge involved there.

Sixth Amendment. See District of Columbia v. Clawans, 300 U.S. 617 (1937).15/

Even with the exception for petty offenses, this Court has recognized that "[t]rial by jury has been established by the Constitution as the 'normal and . . . preferable mode of disposing of issues of fact in criminal cases.'"16/ This Court has never rejected the premise that "the right of the accused to a trial by . . . jury [must] be jealously preserved,"17/ and, for the reasons set forth more fully infra, the case now before the Court is one

15/ In dicta, the Court addressed the issue in several cases between 1888 and 1937. See Natal v. State of Louisiana, 139 U.S. 621 (1891); Schick v. United States, 195 U.S. 65 (1904); District of Columbia v. Colts, 282 U.S. 63 (1930).

16/ Singer v. United States, 380 U.S. 24, 35 (1965), (quoting Patton v. United States, 281 U.S. 276, 312 (1930)).

17/ Patton v. United States, 281 U.S. 276, 312 (1930).

which demands and deserves this Court's intervention to preserve this important constitutional right.

B. The Right To Jury Trial Extends To All Persons Accused Of Committing Serious Criminal Offenses And The Maximum Authorized Term Of Imprisonment Is One Among Several Indicia Of The Seriousness Of The Offense For Sixth Amendment Purposes.

The decisions of this Court have provided useful guidance for determining whether an offense is petty or serious for the purposes of the Sixth Amendment. This Court has developed a three-part test for evaluating the severity of an offense. The essential elements of that structure include consideration of: (1) whether a crime is serious, either intrinsically or as a result of the gravity of potential penalties; (2) whether an intrinsically serious crime has been or could be

classified as petty by mere reduction of the sentence imposed; and (3) whether an intrinsically petty crime has developed into a serious one due to an escalation of the authorized penalties. Courts, not legislators or prosecutors, are the accepted and proper arbiters of whether the Sixth Amendment requires a jury trial for any given offense. Courts are vested with the constitutional task of assessing whether a crime is serious or petty. As stated by the Court in Duncan v. Louisiana:

> Of course the boundaries of the petty offense category have always been ill-defined, if not ambulatory. In the absence of an explicit constitutional provision the definitional task necessarily falls on the courts, which must either pass upon the validity of legislative attempts to identify those petty offenses which are exempt from jury trial or, where the legislature has not addressed itself to the problem, themselves face the question in the first instance.

391 U.S. at 160. As the Ninth Circuit Court of Appeals has observed, in the absence of judicial action, "the constitutional right to a jury trial would exist only at the sufferance of the legislative branch." United States v. Craner, 652 F.2d 23, 25 (1981).

The evaluation of whether the offense is intrinsically serious requires consideration of three factors: (1) whether the crime is indictable at common law; (2) whether the offense is malum in se; and (3) whether the offense involves moral delinquency or turpitude. Crimes indictable at common law are uniformly regarded as serious, despite the insignificance of the penalty attached. See, e.g., Callan v. Wilson, 127 U.S. at 555-557 (conspiracy held to be a serious offense despite assessed sentence of thirty days in

prison). Crimes mala in se are similarly deemed serious despite relatively brief authorized sentences to be imposed upon a finding of violation of the relevant law.[18/] See, e.g., District of Columbia v. Colts, 282 U.S. at 73-74 (reckless driving is malum in se and thus requires jury trial notwithstanding penalty limited to $300 fine or ninety days imprisonment). Cf. District of Columbia v. Clawans, 300 U.S. at 625 (holding that license violation was a morally inoffensive mala prohibita offense, and thus was not triable by jury).

18/ In contrast, offenses mala prohibita were deemed petty and could be summarily tried. See, e.g., Schick v. United States, 195 U.S. at 67 (failure to brand and stamp oleomargarine characteristic of crimes mala prohibita); and Natal v. Louisiana, 139 U.S. at 624 (prohibition on location of private markets characteristic of crimes mala prohibita).

If the offense is not, by its nature, serious, then this Court instructs that the next consideration is whether the sentence imposed is sufficiently serious to elevate the offense from the "petty" to "serious" category. In Schick v. United States, this Court indicated that a crime petty by nature could rise to the level of "serious" solely on the basis of the sentence imposed. 195 U.S. at 67-68. That view was reaffirmed in District of Columbia v. Clawans:

> [T]his Court has refused to foreclose consideration of the severity of the penalty as an element to be considered in determining whether a statutory offense, in other respects trivial and not a crime at common law, must be deemed so serious as to be comparable with common law crimes, and thus to entitle the accused to the benefit of a jury trial prescribed by the Constitution.

300 U.S. at 625.

In a spate of decisions between 1966 and 1970, a number of which concerned sanctions for criminal contempt, the Court refined and elaborated upon the aforementioned analysis without departing from the basic principles. The analysis of criminal contempt proceeded along the conventional lines. The Court inquired whether contempt was by its nature serious, and if not, whether the penalty authorized was sufficiently long to make it so.

In Cheff v. Schnackenberg, 384 U.S. 373 (1966), the Court affirmed that criminal contempt is not a crime which is per se serious. "[C]riminal contempt, intrinsically and aside from the particular penalty imposed [is] not deemed a serious offense requiring the protection of the constitutional guarantees of the right to

jury trial." Id. at 378-80.19/ However, even criminal contempt is no longer viewed as petty if it carries a potential penalty of more than six months. Bloom v. Illinois, 391 U.S. 194 (1968). See also Dyke v. Taylor Implement Co., 391 U.S. 216 (1968).

In Duncan v. Louisiana, this Court elaborated upon the significance of the maximum authorized sentence (as contrasted with the sentence actually imposed or served) as a relevant criterion for establishing the severity of an offense.20/

19/ Cf. Williams v. Florida, 399 U.S. 78, 121 n.7 (1970) (Harlan, J., concurring in part and dissenting in part) ("In Clawans, the Court held the severity of punishment was not determinative when the offense by its own nature is not considered grave.... [In Callan v. Wilson, 127 U.S. 540, 556 and Schick v. United States, 195 U.S. 65], this Court noted that the 'nature' of the offense and the severity of punishment are two distinct considerations.") (emphasis supplied).

20/ See Duncan, 391 U.S. at 160.

In Duncan, the defendant was sentenced to 60 days imprisonment for "simple battery," but imprisonment for up to two years was authorized by the applicable statute. This Court found that the conviction violated the Constitution, and held that "the penalty authorized for a particular crime ... may in itself, if serious enough, subject the trial to the mandates of the Sixth Amendment."21/ The Court added that "[c]rimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses." Id. at 159 (emphasis supplied). Significantly, though, Duncan does not identify the severity of sentence as the sole factor for assessing the seriousness of an offense, and the concomitant trial

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21/ Duncan v. Louisiana, 391 U.S. at 159.

procedures to be extended to persons charged with the offense. "While this Court has said that the most significant index to the seriousness of an offense if the degree of penalty that attaches ... this is not alone determinative .... [T]he 'apportioned punishment [at common law] was both a consequence of the ... quality of the misconduct and an index of the community's moral judgment upon it.'" Williams v. Florida, 399 U.S. at 121 n.7 (Harlan, J., concurring in part and dissenting in part) (1970) (quoting Frankfurter & Corcoron, Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L.Rev. 917, 980 (1926)) (emphasis supplied).

While Duncan held that in some cases "the length of the authorized prison term or the seriousness of other punishment is

enough in itself to require a jury trial,"[22] it does not affect the corollary principle that even offenses bearing shorter potential terms of imprisonment may also be serious crimes, thereby requiring the attendant procedural guarantees extended to persons accused of committing them. See also, Frank v. United States, 395 U.S. 147 (1969); Baldwin v. New York, 399 U.S. 66 (1970).

Baldwin v. New York, id., held that any crime carrying a maximum authorized sentence of more than six months is necessarily serious. This bright-line standard for assessing the severity of an offense was first suggested in Cheff v. Schnackenberg, 384 U.S. 373, where this Court, relying upon its supervisory power,

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22/ 391 U.S. at 161.

imposed a six-month limit on sentences imposed by federal courts in contempt proceedings. In Baldwin v. New York, the Court squarely addressed the issue, holding that "no offense can be deemed 'petty' for purposes of the right to trial by jury where imprisonment for more than six months is authorized." 399 U.S. at 69 (emphasis supplied).

This Court has repeatedly adhered to the basic principle that the Sixth Amendment assessment of the seriousness of a crime depends upon its intrinsic nature as well as the severity of the maximum authorized penalty.[23/] Finally, a crime

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23/ In Codispoti v. Pennsylvania, 418 U.S. 506 (1974), the Court held that petty contempt could be tried without a jury.

Codispoti acknowledged that a majority of the Court had never agreed that sentences of six months or less were necessarily petty. Id. at 512 n.4. Noting that two members of the Court in Baldwin believed that jury trials were required in

(continued...)

serious by nature may not be made petty merely by reducing the maximum authorized

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23/ (...continued)
all criminal prosecutions, the Court noted in Codispoti that the Baldwin majority had agreed only that crimes carrying sentences exceeding six months were certainly serious. Id. The converse had not been decided in Baldwin. Thus, Codispoti's implication that this Court's decisions "have established a fixed dividing line between petty and serious offenses" must be considered against the background of the Court's continued adherence to considering the nature as well as the seriousness of the offense. Id., at 511-12 (citing Frank v. United States, 395 U.S. at 149-50, and Baldwin v. New York, 399 U.S. at 69).

Significantly, two cases decided after Codispoti reaffirm the Court's long tradition of examining the nature of the offense as well as the penalty authorized. In Muniz v. Hoffman, 422 U.S. 454, (1975), Justice White wrote that criminal contempt, "in and of itself and without regard to the punishment imposed, is not a serious offense absent legislative declaration to the contrary." 422 U.S. at 476 (emphasis supplied). In Ludwig v. Massachusetts, 427 U.S. 618, (1976), the Court upheld Massachusetts' two-tier system of trial courts and noted that a petty offense is "usually defined by reference to the maximum punishment that might be imposed" 427 U.S. at 624-625 (emphasis supplied). Both opinions thus indicate the possibility that a petty offense could be converted into a serious one by legislative declaration.

sentence,[24] and a crime petty by nature could be made serious by increasing the maximum sentence.[25] Thus, it is clear that the severity of a crime depends upon both the nature of the offense and the penalty imposed.

The most significant doctrinal development in the judicial process of establishing the boundaries required by Duncan has been the evolution of objective standards for evaluating the severity of an offense. This Court suggested in Baldwin that in deciding whether an offense is "petty" or "serious," courts should look to objective criteria reflecting the

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24/ Cf. Baldwin v. New York, 399 U.S. at 76 n.2 (Black, J., concurring) ("[W]hen the sanction [imposed against an individual] bears all the indicia of a criminal punishment, a jury trial cannot be denied by labeling the punishment 'petty.'").

25/ See supra note 23.

seriousness with which society regards the offense. Baldwin also indicates that the maximum authorized length of imprisonment is a relevant objective criterion. However, the maximum authorized sentence is but one objective criterion, and the courts must look to all the relevant criteria in each particular case. The additional measures of the severity of a crime, as is clear from the Court's opinions dating back to 1888, are based upon four factors: historical and federal practices, collateral consequences, and contemporary responses to criminal acts.

An example of the importance of historical practice is the tradition of punishment for contempt of court. The fact that for centuries contempt has been summarily punished weighed heavily in the Court's conclusion that contempt was not

intrinsically serious. See Green v. United States, 356 U.S. 165, 183 n.14 (1958); United States v. Barnett, 376 U.S. 681, 692-700 (1964). See also District of Columbia v. Clawans, 300 U.S. at 625-26 (discussing standards prevailing at time of adoption of Constitution as a guidepost for the Sixth Amendment assessment of the seriousness of an offense).

Similarly, the federal practice of defining petty offenses as the category of offenses punishable by not more than six months imprisonment and a $500 fine influenced this Court's decision that the right to jury trial must be extended to a person accused of committing crime for which the authorized sentence exceeded six months. See Duncan v. Louisiana, 391 U.S. at 161.

Another important consideration is whether serious collateral consequences attend conviction for the offense. In Baldwin, Justice White examined the collateral consequences in assessing the gravity of conviction for felonies and misdemeanors and in establishing "that some misdemeanors are also 'serious' offenses."[26/] Lower federal courts[27/] and state courts[28/] have also considered the collateral consequences in assessing the

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26/ 399 U.S. at 70. See generally id. at 69 n.8; see also District of Columbia v. Clawans, 300 U.S. at 628 (practices of community taken as gauge of its social and ethical judgments).

27/ See, e.g., United States v. Craner, 652 F.2d 23, 25-26 (9th Cir. 1981).

28/ See, e.g., State v. Wilke, 291 N.W.2d 793, 794, (S.D. 1980) ("To determine whether a crime is serious or petty, we look to ... whether society views the offense with sufficient opprobrium, and the consequences of conviction."); Baker v. City of Fairbanks, 471 P.2d 386, 395, 401 (Alaska 1970) ("[c]ollateral consequences to the accused are reflected by our mores and standards.").

constitutional necessity of providing a jury trial.

Finally, the Court has relied heavily on the sanctions currently imposed for the criminal offense. For instance, in Duncan v. Louisiana, the Court examined other states' practices in punishing simple battery. 391 U.S. at 161. See also Baldwin v. New York, 399 U.S. at 70-71 (practices of states relevant to six month rule).

The Ninth Circuit held in United States v. Craner, 652 F.2d 23, that driving under the influence of alcohol in a national park was a serious offense, even though it carried a six months maximum sentence. The court stated:

> The extent of possible punishment does not, however, alone determine whether an offense is serious or petty. Otherwise the constitutional rights to a jury trial would exist only at the sufferance of the legislative branch.

> ....
> To gauge the seriousness of an offense, the Supreme Court has in recent years looked to the authorized penalty and to the "relevant rules and practices followed by the federal and state regimes."
> ....
> [In addition,] consideration of the future [collateral consequences] of conviction [is relevant] in deciding whether an offense is a serious one (emphasis supplied) (citations omitted).

Id. at 25-26.[29/]

State courts are also in agreement with the Ninth Circuit. A thorough consideration of the issue appears in State v. Wilke, where the Court stated:

> To determine whether a crime is serious or petty, we look to the maximum punishment ... and the nature of the offense, and consider its common law background

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29/ See also United States v. Stewart, 568 F.2d 501 (6th Cir. 1978); United States v. Sanchez-Mesa, 547 F.2d 461 (9th Cir. 1976); United States v. Woods, 450 F. Supp. 1335 (D. Md. 1978); and Brady v. Blair, 427 F. Supp. 5 (S.D. Ohio 1976).

> ..., whether society views the offense with sufficient opprobrium, and the consequences of conviction.30/

291 N.W.2d at 794.

In District of Columbia v. Clawans, 300 U.S. 617, the Court examined a District of Columbia statute that proscribed engaging in the business of selling second-hand property (in that case, the unused portion of a railway excursion ticket) without a license. The Court held that the offense was "at most but an infringement of local police regulations, and its moral quality is relatively inoffensive." 300 U.S. at 625. Indeed, such would probably be most people's definition of a petty

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30/ See also Bruce v. State, 614 P.2d 813, 815, 126 Ariz. 271, 273 (1980) ("Other criteria include whether the offense was classified as a crime at common law as well as the moral quality of the act."); People v. Oppenheimer, 42 Cal.App. 3d Supp. 4, 8 n.6, 116 Cal.Rptr. 795 (Cal.Super. 1974) (noting that Codispoti spoke of contempt only).

crime today. In contrast, however, a DUI charge in Nevada is hardly a "relatively inoffensive" transgression of "local police regulations." With the mandatory jail sentence for first offenders, automatic revocation of driver's license, increasing penalties and imprisonment, not to mention the economic sanctions and great public opprobrium brought down upon the offender, it cannot be said to be a "petty" offense.

II. DRIVING UNDER THE INFLUENCE OF ALCOHOL IS A SERIOUS CRIMINAL OFFENSE IN NEVADA, AND THERE IS NO JUSTIFICATION FOR THE DENIAL OF PETITIONERS' FUNDAMENTAL RIGHT TO BE TRIED BY A JURY ON THESE CHARGES.

A. Applying The Standards Articulated In The Decisions Of This Court, It Is Clear That The Offense Of Driving While Under The Influence of Alcohol Is A Serious Offense In Nevada.

Driving under the influence is a serious problem nationwide, as this Court

has observed. "The carnage caused by drunk drivers is well documented.... This Court ... has repeatedly lamented the tragedy."[31/] The nature of the offense itself, the harsh collateral consequences attendant to DUI conviction, and the fact that the penalty for the offense includes mandatory imprisonment reflect the seriousness of the crime in Nevada.[32/]

Nevada, like the rest of the nation, has recognized that DUI is a serious offense and has acted to impose more severe sanctions for violation of its laws against drunk driving. "The Legislature passed [a] stiffer DUI law in 1983, calling for a

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31/ South Dakota v. Neville, 459 U.S. 553, 558-59 (1983). See also Breithaupt v. Abram, 352 U.S. 432, 439 (1957); Tate v. Short, 401 U.S. 395, 401 (1971) (Blackmun, J., concurring); Mackey v. Montrym, 443 U.S. 1, 17-19 (1979).

32/ See Bronson v. Swinney, 648 F.Supp. 1094 (D. Nev. 1986).

mandatory minimum two-day jail sentence or 48 hours of public service for first-time offenders. It was one of the strictest anti-DUI laws in the nation."[33/] The 1981 statistics on alcohol-related traffic fatalities in Nevada afforded Nevada the unenviable distinction of "rank[ing] first among the states in fatal traffic accidents for the number of miles driven."[34/] Such statistics reportedly prompted the 1983 and 1985 state legislative efforts to enact "tougher DUI laws" and to "crack [ ] down on drunk driving offenses."[35/] Such legis-

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33/ Phillis, Officials Fear Tougher Laws Losing Punch, Reno Gazzette-Journal, April 18, 1988, at 1C.

34/ Legislative Commission of the Legislative Counsel Bureau of the State of Nevada, Driving While Intoxicated, Bull.No. 83-7 at 1 (1982).

35/ Morrison, Tougher Laws Have Slight Effect on DUI Deaths, Reno Gazzette-Journal, November 22, 1987, at 17A. In addition, "[T]he 1987 Legislature passed laws allowing police to take blood samples

(continued...)

lative efforts reflect the prevailing sentiment in Nevada that DUI is a serious offense.

In Nevada, a first DUI offense is serious, even though labelled a misdemeanor. Nevada Revised Statutes §484.3792 (1983) provides that, for a first offense DUI, the court shall:[36]

> (1) Order the offender to pay tuition for an educational course on the abuse of alcohol and controlled substances;[37]
> (2) Unless the sentence is reduced pursuant to Nev. Rev. Stat. 484.3794, sentence him to imprisonment for not less than two days nor more than six months in jail, or to perform forty-eight hours work for the community while dressed in distinctive garb that identifies him as a DUI offender; and (3) Fine him not less than $200 nor more than $1,000.

The educational course, mandatory jail time and mandatory fine of $200 to $1,000, were added to the statute by amendment in 1983.[38] Additionally, the Nevada law provides:

> 3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or

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35/ (...continued)
the second time someone is arrested for DUI." Id.

36/ The only statutory alternative allowed for first-time DUI offenders is to agree to undergo a treatment program, lasting for at least one year. See Nev. Rev. Stat. § 484.3794 (1983). However, even these offenders are subject to mandatory incarceration or community service for twenty-four hours. Nev. Rev. Stat. § 484.3794(1)(c)(1).

37/ The teacher of the educational course is to report back to the court if he or she believes the offender is an abuser of alcohol or controlled substances. The statute does not provide what use the court will make of the information.

38/ See 1983 Nev. Stat. 1068-72.

cannot be proved at the time of trial.[39]

As noted in Bronson v. Swinney, 648 F.Supp. 1094 (D.Nev.1986), statutory limitations on prosecutorial and judicial discretion are exceptional, and a misdemeanor criminal statute with a mandatory jail term is quite unusual. "Even some of the most heinous crimes are not punishable by mandatory imprisonment without the possibility of release on probation." Id. at 1099. In making a decision as to whether a crime is petty or serious, courts are to look to "objective standards such as may be observed in the laws and practices of the community taken as a gauge of its social and ethical judgments." District of Columbia v. Clawans, 300 U.S. at 628. The

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39/ Nev. Rev. Stat. §484.3792(3)(1983)(emphasis supplied).

amendments to the DUI statutes of Nevada restricting judicial and prosecutorial discretion and mandating, inter alia, imprisonment with no probation objectively demonstrate that the people of Nevada consider DUI a serious offense in every instance.

DUI may not always have been considered a serious offense, but it has now become a matter so clearly disfavored in Nevada that the punishment and the collateral consequences of conviction have been repeatedly enlarged. This development in Nevada is further illustrated by the fact that both prosecutors and judges have been legislatively stripped of discretion in the disposition of DUI cases[40] in an effort to ensure that punishment for the

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40/ See Nev. Rev. Stat. § 484.3792(3) (1983).

offense is "certain, severe and swift."41/

The general populace now views DUI as a serious criminal act and greatly

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41/ In an editorial discussing the efforts of a Nevada legislative subcommittee considering amendments to the state's DUI laws, a Reno Gazette-Journal editor wrote:

> [The subcommittee's] members noted that deterrence is best achieved by "certain, severe and swift punishment." They concluded, in language unfortunately too diplomatic, that "the element of certainty of punishment is not fully realized in the judicial process and...swiftness of punishment is sometimes lacking in the court system." ...[T]oday the Legislature has before it a bill that will remove still more discretion from the judges. This bill must be passed, for the protection of every driver in Nevada.

Drunken Driving Bill Would Crack Down on Judges, Reno Gazette-Journal, Feb. 17, 1983, at 21A. See also Kimble, George Ceccarelli On Drunk Drivers: "Let the Sentence Fit the Crime", The Nevada Highway Patrolman, vol. III, no. 1, (Jan. 1983) 48-50, in which Ceccarelli, the Founder of Concerned Citizens and Victims of Drunk-Drivers, discusses her dissatisfaction with judicial and prosecutorial treatment of DUI cases in Nevada.

disapproves of DUI offenders.42/ Like the rest of the country, Nevada has attempted to respond to the public perception that drunk driving is a widespread and serious societal problem.43/ The punishments proscribed by Nevada law leave no doubt as to the legislative judgment about the seriousness of the crime. Increased penalties for drunk driving leave little doubt that driving under the influence is now viewed as a serious problem and as a serious crime.

While the maximum authorized sentence for an offense is clearly relevant to the Court's consideration of the seriousness of

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42/ This disapproval is perhaps not surprising in light of statistics suggesting that nearly half the people in the nation will at some time be involved in an alcohol-related automobile accident. Landry v. Hoepfner, 840 F.2d 1201, 1213 n.25 (5th Cir. 1988).

43/ See generally Legislative Commission of the Legislative Counsel Bureau of the State of Nevada, Driving While Intoxicated, Bull.No.83-7 (1982).

the DUI offense in Nevada, Chief Justice Rehnquist cautioned in Codispoti that the length of sentence test should not be "woodenly" applied. Codispoti, 418 U.S. 525, 536-37. Also, this Court, in Duncan v. Louisiana, held that, "[i]n determining whether the length of the authorized prison term or the seriousness of other punishment is enough in itself to require a jury trial," courts are counseled "to refer to objective criteria, chiefly the existing laws and practices in the Nation." 391 U.S. at 161. Moreover, the Court, in District of Columbia v. Clawans, recognized that standards of action and of policy vary considerably from generation to generation, and that crimes and punishment once thought to be mild may come to be regarded as harsh, calling for a jury trial, even though a jury trial may not have been

provided for prior to the adoption of the Constitution. 300 U.S. at 627. All indicia of an offense recognized as "serious" by this Court are present in the case of DUI in Nevada.

The "wooden[ ]" application of the six month rule has, in at least one case, yielded a result which amici believe is clearly inconsistent with the requirements of the Sixth Amendment. Landry v. Hoepfner, 818 F.2d 1169 (5th Cir. 1987), rev'd en banc, 840 F.2d 1201 (5th Cir. 1988), involved a state statutory scheme which, like the Nevada legislation, imposes serious penalties for a first offense DUI conviction including a mandatory jail sentence, period of community service, and/or participation in a substance abuse treatment program, but nevertheless does not provide for jury trials in such cases.

See 840 F.2d at 1202-04. The Court of Appeals wrote in Landry:

> [I]t is clear that an infraction may be a 'petty offense,' for which the United States Constitution does not require that there be a right of trial by jury, notwithstanding that it is clearly a 'crime' which may be punished by as much as six months' imprisonment.... [A]t least respecting offenses not indictable at common law, when the legislature of a state elects to make criminal certain conduct within that state's borders, it is likewise entitled to determine that the offense it has created shall not be a 'serious' one by fixing 'petty' under the bright-line rule of Baldwin[44/]

Thus, the wooden application of a bright line rule for determining whether an offense is sufficiently serious to require trial by jury led the Fifth Circuit Court of Appeals to permit the state to circumvent the requirements of the Sixth

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44/ 840 F.2d at 1206, 1210 (citation omitted).

Amendment by allowing it to impose "sanction[s which] bear[ ] all the indicia of a [serious] criminal punishment" while denying the right to jury trial merely "by labeling the punishment [and the offense] 'petty.'" Baldwin v. New York, 399 U.S. 66, 76 n.2 (Black, J., concurring). Amici submit that the Landry court erred by mechanistically applying a six-month rule. The majority in Landry simply determined that driving under the influence was not an indictable offense at common law,[45/] and concluded that since the maximum sentence did not exceed six months, the offense

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45/ But see Landry v. Hoepfner, 840 F.2d 1201, 1220 (Garza, J., dissenting)(expressing "amuse-[ment]" with the majority's "conclusion that DWI was never an indictable offense at common law," and noting that "it was not indictable at common law...because the offense did not exist at common law.")(emphasis supplied).

should not be considered a serious one requiring a jury trial.

In addition, the Landry Court attempted an untenable distinction between the situation presented by the Louisiana DWI statute and District of Columbia v. Colts, 282 U.S. 63, which held that a person charged with reckless driving must be provided a jury trial upon demand, although the maximum authorized imprisonment was thirty days. The majority's distinction defies logic. In Nevada and elsewhere, DUI is currently considered a more serious offense than reckless driving.46/ Nevertheless, to reach the conclusion that the reckless driving charge

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46/ See Nev. Rev. Stat. § 484.377; see generally Lehmann, Reckless Driving as Lesser Included Offense of Driving While Intoxicated or Similar Charge, 10 ALR 4th 1252 (noting that many DUI charges were pleaded down to reckless driving in the past).

in Colts was more serious than a modern-day DUI charge, the Landry Court held that the reckless driving in Colts was not just "reckless driving" but "driving so recklessly as to endanger property and individuals." 840 F.2d at 1212. Implicit in this holding is the conclusion that drunk driving is not "driving so recklessly as to endanger property and individuals." This conclusion is simply untenable. Nevertheless, the end result of Landry is that a person accused of reckless driving is entitled to a jury trial,47/ but a person accused of DUI is not similarly afforded a jury trial upon request in Nevada. This result is clearly incongruous and contrary to public policy and, for the reasons set

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47/ See Colts, supra.

forth supra, should be rejected by this Court.

Nevada's statutory scheme imposes additional serious collateral consequences for a conviction of driving under the influence. The offender faces automatic driver's license revocation. Nev. Rev. Stat. § 484.384. As noted by the court in Bronson v. Swinney, in Nevada, where distances are great, the revocation of a driver's license is a serious matter. "Driving is nearly imperative to the ability of many people to earn a living." 648 F.Supp. at 1099. Another major consequence is that the penalties provided in the statute compound so that the third conviction within a seven year period carries a mandatory penalty of imprisonment in the state prison for not less than one year nor more than six years, and a fine of

not less than $1,000 nor more than $5,000. Nev. Rev. Stat. § 484.3792. Additionally, the names of DUI offenders in Nevada are regularly published in the newspapers, thereby exposing DUI offenders to even greater stigma. 648 F.Supp. at 1099-100. Obviously a first or second DUI conviction will have greater collateral consequences than a first or second conviction for most misdemeanors.

In light of the threat of mandatory jail time without the possibility of probation, automatic driver's license revocation, escalation of penalties faced for subsequent DUI offenses, public opprobrium and the serious economic repercussions affecting the average individual charged with a DUI, the offense must be considered serious.

Driving while intoxicated is a deadly crime. The people of

> the State of Nevada, through their legislature and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime.

Bronson v. Swinney, 648 F.Supp. at 1100. In Nevada, DUI is clearly a serious criminal offense and thus, petitioners should have been afforded an opportunity for jury trial on the charges against them.

B. Petitioners' Interests Are Disserved By The State Of Nevada's Statutory Preclusion Of Jury Trials For Individuals Accused Of DUI, And There Are No State Interests Of Constitutional Magnitude Served By The Deprivations Of The Jury Trial Right Which Occurred In This Case.

The Court below held, inter alia, that

> [A] non-jury trial, in a misdemeanor case, is speedy and inexpensive. On the other hand, a decision of this court requiring jury trials in the prosecution of DUI offenses in the municipal court would result in tremendous expense to the municipalities of this state.... [S]erious financial, administrative, and policy

> concerns [would arise if t]he position of the federal district court in Bronson ... were ... to be adopted by this court....

Blanton v. North Las Vegas, 748 P.2d 494, 501-02 (Nev. 1987). This conclusion is troubling for a number of reasons.

Amici note, at the outset, that administrative burdens alone cannot justify the denial of a fundamental constitutional right. As discussed fully supra, the decisions suggest that the right to jury trial for an individual accused of DUI in Nevada is such a right. However, assuming arguendo that the court below has properly identified state interests which must be balanced against the petitioners' constitutional interests, it is appropriate to consider whether the government's interests here outweigh the interests served by pro-

viding DUI defendants the option to request trials by jury.[48]

This Court has identified "the interposition between the accused and his accuser of the common sense judgment of a group of laymen, and ... the community participation and shared responsibility that results from that group's determination of guilt and innocence" as the "essential feature[s] of a jury." Williams v. Florida, 399 U.S. 78, 100 (1970). These "feature[s] of a jury" are among the interests which would be served by affording petitioners the opportunity for jury trial. One federal judge, evaluating

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48/ "Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard .... [b]ut the government's interest ... in conserving scarce fiscal and administrative resources, is a factor that must be weighed." Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

his experience with jurisdictions that only provide bench trials for persons accused of DUI, has written:

> [I]n many ... jurisdictions, DWI cases are handled as if in a mass production line.... An offender who believes that he was unlawfully charged with driving while intoxicated would have the protection of ... having his case tried by a jury [if the appropriate assessment of the seriousness of the DUI offense were made].[49]

While the judges in a jurisdiction which requires bench trials in all DUI cases may not intend to deliver "mass production" justice, the Nevada experience to date suggests that it may prove difficult to avoid this result where "everyone in the court is loaded with work," and "keep[ing] up with the added DUI cases...[requires

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49/ Landry v. Hoepfner, 840 F.2d 1201, 1220 (5th Cir. 1988) (Garza, J., dissenting).

conducting] an average of two trials ... every day."50/

An additional pressure evidently exerted upon Nevada's judges in DUI cases is the perception that "the state's courts [a]re being too lenient on drunken drivers."51/ This perception is sufficiently widespread to have prompted amendment of the state's DUI laws to "remove...discretion from the judges."52/ Where, as here, judicial as well as prosecutorial discretion is severely curtailed by statute, the accused might opt for a jury trial because he believes that the jury "represents an impressive way of

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50/ Phillis, Officials Fear Tougher Laws Losing Punch, Reno Gazette-Journal, April 18, 1988 at 2C.

51/ Editorial, Drunken Driving Bill Would Crack Down On Judges, Reno Gazzette-Journal, Feb. 17, 1983, at 21A.

52/ Id.

building discretion, equity, and flexibility into a legal system. Not the least of the advantages is that the jury, relieved of the burdens of creating precedent, can bend the law without breaking it."53/ Judges administering DUI laws have also been subjected to monitoring by groups such as Mothers Against Drunk Driving54/ and Concerned Citizens and Victims of Drunk Drivers.55/ One exhibit to the record of the Nevada Legislature's 1983 joint hearing on the DUI laws warned that "judges ... had best start watching those court-watchers appearing more and more regularly in their courtrooms to

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53/ Kalven & Zeisel, supra, note 10 at 498.

54/ See, Exh. D. to the Minutes of the Nevada State Legislature Joint Hearing on Drunk Driving (Feb. 17, 1983). at 65-66.

55/ See Kimble, supra note 40 at 49.

observe drunk driving proceedings. They're MADD [Mothers Against Drunk Driving] ladies, and they're starting to keep tabs. The results could be embarrassing come next election."[56/] This is not an idle threat since judges at all levels of the Nevada judiciary are popularly elected.[57/] In Nevada Highway Patrolman, the founder of Concerned Citizens and Victims of Drunk Drivers, said that on one occasion her court monitoring led the judge to deny a motion for reduction of bail in a DUI case.[58/] Under the circumstances, a defendant's interest in the jury trial

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56/ See supra note 53.

57/ See Nev. Const., Art. VI, §§ 3 and 5.

58/ Kimble, supra, note 40 at 49. Later in the interview CCVD founder George Ceccarelli discusses a case where a DUI defendant received an "unusual[ly]" harsh sentence. After the sentencing she introduced herself to the defendant's lawyer and, according to Ceccarelli, he replied, "Oh, now I know why he got such a stiff sentence.'" Id.

right is substantial, and preservation of that right is particularly important here "to protect against ... judges too responsive to the voice of higher authority," and to provide a necessary "safeguard against the compliant, biased, or eccentric judge." Duncan v. Louisiana, 391 U.S. at 156.

Due to the pressure brought to bear on prosecutors and judges by outraged citizen groups against drunk driving,[59/] there is a real danger of assembly line

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59/ One Nevada newspaper compared the legislative debate of the DUI legislation in 1983 to a "binge" in which "raucous witnesses ... shouted their desire to somehow legislate revenge for relatives killed in highway wrecks ... [and l]awmakers ... joined in by proposing ways the laws might be made more harsh to deliver vengeance." The editorial concluded by urging a return to "sober reflection on .. what ... the legislature might do to effectively and reasonably address the problem of highway traffic deaths." Time To Sober Up About Drink Driving Penalties, Elko Daily Free Press, Apr. 11, 1983.

justice being meted out by overzealous prosecutors and judges when jury trials are not allowed. The very purpose of the Sixth Amendment is to protect citizens in serious criminal cases against arbitrary and oppressive law enforcement. The DUI defendant in Nevada is charged with a serious crime in all respects and should be guaranteed a jury trial to prevent such arbitrariness and oppression.

While the decision below cited the "tremendous expense" which would result from the application of the Sixth Amendment jury trial right in the cases of DUI defendants, this Court noted, in Baldwin v. New York, that "[e]xperience in other States ... where jury trials are available for all criminal offenses including traffic violations ... suggests that the administrative burden is likely to

be slight, with a very high waiver rate of jury trials." 399 U.S. at 74 n.22.60/ Although comprehensive information is unavailable at this time, statistics furnished by the Justice Court of Nevada's second largest city support this Court's assertion in Baldwin that the additional administrative burdens imposed upon the state will not be great.

In 1986, the Reno Justice Court began to allow jury trials upon request by individuals charged with DUI. In 1986, all 707 individuals charged with DUI were informed that they could elect a jury trial; only 111 requested a jury trial, and only one jury trial was conducted in 1986, at a total cost of $284.70. In 1987, of 897 individuals charged with DUI, only 126

60/ Accord Kalven & Zeisel, supra note 10 at 24-31.

requested a jury trial, and twelve trials were conducted, at a total cost of $4,961.36.[61] Although this information is limited, it clearly contradicts the conclusion that "[t]he resulting expense to the municipality ... [is substantial enough to] deter the prosecution of DUI offenses." Blanton, 784 P.2d 484, 501.

Finally, it is significant that a majority of the states have been able to extend to DUI defendants the very protection the state seeks to deny here without experiencing the calamitous results predicted in the decision below.[62]

61/ Unpublished Reports of the Reno, Nevada Justice Court Statistics. (December 31, 1986 and December 31, 1987). (Furnished by Carolyn Higgins, Chief Criminal Clerk of the Reno, Nevada Justice Court).

62/ There is some disagreement about the precise number and circumstances of the states providing DUI defendants with jury trials upon demand, compare Landry v. Hoepfner, 818 F.2d 1169, 1174 n.2 (continued...)

When one weighs the importance of the liberty interests implicated by DUI conviction against the administrative and fiscal burdens of the additional due process protection being requested, it is apparent that a DUI defendant in Nevada should be entitled to a jury trial upon demand.

62/ (...continued)
(5th Cir. 10987) (noting that "only six states deny defendants the right to trial by jury on DWI charges") with Landry, id. at 1185-86 (Garwood, J., dissenting) (disagreeing with majority's statistics, and suggesting that "about a fourth or a fifth of the states ... do not authorize a jury for DWI"). By even the most conservative estimates, a majority of states allow jury trial of persons charged with DUI.

CONCLUSION

For the reasons set forth above, amici respectfully urge this Court to reverse the decision below.

Respectfully submitted,

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